No. 91-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VIACOM INTERNATIONAL, INC.,

Petitioner,

vs.

CARL C. ICAHN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. TIGAR*
727 East 26th Street
Austin, Texas 78705
(512) 471-6319

STEPHEN LOWEY
NEIL L. SELINGER
LOWEY DANNENBERG BEMPORAD
& SELINGER, P.C.
747 Third Avenue
New York, New York 10017
(212) 759-1504

EDWARD LABATON
New York, New York

JOHN MAGE
New York, New York

* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. Are threats resulting in "greenmail" payments for stock listed on the New York Stock Exchange exempt from the prohibitions of the Hobbs Act, 18 U.S.C. §1951, notwithstanding that Respondents wrongfully used fear of economic loss to coerce Petitioner into purchasing their stock at a price substantially in excess of the market value?

2. Does a party suffer injury in its business or property within the meaning of 18 U.S.C. §1964(c) when it is coerced into purchasing a minority block of stock at a price materially above the market price? Or is that injury not compensable because, months after the purchase, 100% of the stock of the company is sold at an even higher price?

3. May a court, as a matter of law and in the face of disputed evidence, reject the "efficient capital market theory" as the appropriate measure of the value of a non-control block of stock traded on a national securities exchange?

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OCTOBER TERM, 1991

VIACOM INTERNATIONAL, INC.,[1]

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vs.

CARL C. ICAHN, ICAHN HOLDING CORPORATION, ICAHN CAPITAL CORPORATION, HERON INVESTORS PLAN INC., AFC INDUSTRIES, INCORPORATED, UNICORN ASSOCIATES CORPORATION, GNU CORP., EXCALIBER PARTNERS, HEALTH INVESTORS LIMITED PARTNERSHIP, LONGVIEW INVESTORS LIMITED PARTNERSHIP, HARMONIOUS ASSOCIATES LIMITED PARTNERSHIP, and STORK ASSOCIATES LIMITED PARTNERSHIP,[2]

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

[1] Subsequent to the events at issue in this litigation, Petitioner Viacom International Inc. ("Viacom") became a wholly-owned subsidiary of Viacom, Inc., 75% of whose shares are owned by National Amusements, Inc.

[2] These corporations and partnerships are all controlled by Respondent Carl C. Icahn.

OPINIONS BELOW

The majority and concurring opinions of the United States Court of Appeals for the Second Circuit are reported at 946 F.2d 998 (2d Cir. 1991). The Court's slip opinion dated October 6, 1991 is reproduced at Appendix 1-12. The opinion of the United States District Court for the Southern District of New York (Patterson, J.) granting summary judgment dismissing the action is reported at 747 F. Supp. 205 (S.D.N.Y. 1990). An earlier opinion of the District Court (Ward, J.) delivered orally and an order denying dismissal of the action are reproduced at Appendix 19-71; 72.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered and filed on October 9, 1991. The judgment may be reviewed by this Court by writ of certiorari granted under 28 U.S.C. §1254(1). This petition for a writ of certiorari to review the judgment of the Court of Appeals, having been filed within 90 days after the entry of the judgment, is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13, notwithstanding issuance by the Court of Appeals of its mandate on October 30, 1991 and denial by the Court of Appeals of Viacom's motion to recall the mandate on November 27, 1991. *The Conqueror*, 166 U.S. 110 (1897); *Carr v. Zaja*, 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 467 (1947); *Graddick v. Newman*, 453 U.S. 928, 945 (1981) (Rehnquist, J.); *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (Rehnquist, J.).

STATUTES AT ISSUE

- Hobbs Act, 18 U.S.C. §1951.

- Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961, 1962, 1964

The pertinent texts of these statutes are set forth at Appendix 14-18.

STATEMENT OF THE CASE

A. *Greenmail, The Hobbs Act, and RICO*

By the mid-eighties, "[g]reenmail had become the *bête noire* of corporate America" and Carl Icahn had become a "notorious greenmailer." Bruck, *The Predators' Ball*, pp. 162-63 (The American Lawyer/Simon and Schuster, 1988).[3] In this action, brought pursuant to 18 U.S.C. §1964 (the civil remedy provision of RICO), Viacom International Inc., a victim of Icahn's greenmail, asserts that Icahn committed extortion in May of 1986 when he obtained from Viacom securities and other consideration worth $60,000,000, solely for discontinuing a wrongful threat to take over and break up Viacom.[4]

One District Court judge (Ward, J.) denied Icahn's motion to dismiss, ruling that whether Icahn's inducement of Viacom's fear of economic harm was "wrongful" depended upon Icahn's intent – an issue of fact for the jury. [See Appendix 37-40; 64] A different District Court judge (Patterson, J.), to whom the case was reassigned, later dismissed Viacom's claim before completion of discovery on grounds that, irrespective of Icahn's intent, his conduct was not wrongful as a matter of law. 747 F. Supp. 205 (S.D.N.Y. 1990).

Even though he wrote that "[d]efendants' argument that plaintiff has suffered no damages need not be reached," 747 F. Supp. at 214, Judge Patterson recognized on oral argument that Icahn's summary judgment position on damages raised disputed issues of material fact [A-1084-1088].[5] Indeed, counsel for

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[3] Greenmail is an "unsavory practice . . . in which a large, hostile stake is accumulated in a company hoping to scare management into buying out the raider at a premium price." Stewart, *Den of Thieves*, p. 99 (Simon and Schuster, 1991).

[4] "Extortion" is defined in the Hobbs Act, 18 U.S.C. §1951, as "the obtaining of property from another, with his consent, induced by wrongful use of . . . fear" and is listed as a RICO predicate act, 18 U.S.C. §1961. In its Amended Complaint, Viacom alleged that Icahn engaged in a pattern of racketeering activity through a series of acts of extortion and securities fraud. [A-16-19]

[5] Page references preceded by A-__ refer to the four volume Joint Appendix filed in the Court of Appeals.

Icahn himself recognized this earlier in urging Judge Ward to bifurcate the trial and hold a mini-trial to resolve the damages issues [A-1427-31], which Judge Ward refused to do. [A-210]

Without addressing any of the "confidential" procedural matters raised by Viacom,[6] or whether the case was ripe for summary judgment,[7] or whether Icahn may have violated the Hobbs Act, two judges of the Second Circuit panel (Kearse, C.J. and Sneed, C.J., sitting by designation) affirmed dismissal of the case "because we conclude that Viacom was not damaged by the transaction." Slip op. at 42. Recognizing the existence of disputed evidence concerning applicability of the efficient capital market hypothesis, one Circuit Judge (Mahoney, C.J.) concluded that the issue of damages could not be decided as a matter of law. Slip op. at 47. Nonetheless, he concurred because he was "in essential agreement with the district court's analysis that Viacom's allegations of Hobbs Act violations are inadequate to state a claim." Slip op. at 48.

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[6] Volume Three of the Joint Appendix, containing references to certain documents, *in camera* proceedings, and *ex parte* communications by Icahn to the District Court, designated "confidential" by the District Court at Icahn's request, was filed with the Court of Appeals under seal at Icahn's insistence. Viacom's Brief and Reply Brief, containing references to these "confidential" procedural matters, were also filed under seal at Icahn's insistence. Also at Icahn's insistence, Viacom's Appellate counsel was forbidden to refer at oral argument to these "confidential" matters.

[7] This Court has recognized that summary judgment is only appropriate "after adequate time for discovery", and that a party should not be "railroaded" into a premature summary judgment motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 326 (1986). *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 n.5 (1986).

The District Court proceeded to summary judgment over the strenuous objections of Viacom, which sought to proceed with the pending deposition of Icahn and obtain the documents he had produced to the SEC. [A-668-79] Viacom was also denied discovery of a transcript of Icahn's prior testimony before the SEC. Also denied to Viacom was discovery of the *ex parte* communications between counsel for Icahn and Judge Patterson, on which the District Court based its order denying discovery of Icahn's prior testimony. [A-1360-87] Viacom also had served a subpoena on Ivan Boesky [A-6, Docket No. 52], but at the time of the summary judgment hearing Boesky was unavailable to be deposed.

B. *Viacom, Icahn, and Boesky*

Viacom was spun-off from CBS in 1971. In the period from 1971 to 1986 it had been under substantially the same management. Viacom's performance was extraordinary; its earnings increased every year during that period. In the decade prior to 1986, Viacom's profits had compounded at about a 20% annual rate. [A-1036-53; A-682-700]

Viacom employed approximately 3,900 persons. Viacom's shares were traded on the New York Stock Exchange. There were some 20,000,000 shares outstanding, and nearly 20,000 shareholders. The company had high cash flow, and relatively low debt. Directors owned only about 3.5% of the common stock. [A-1036-53]

In the atmosphere of the mid-eighties Viacom's very success and sound balance sheet made it a subject of take-over speculation. On October 11, 1985 a Wall Street Journal article asserted that Viacom "is increasingly seen as [a] takeover play." In the following months the press recounted various rumors, various estimates of the "break-up" value of the company, "defensive" moves by Viacom to discourage raids, and the acquisition by JMB Realty Corp. of Chicago of some 11.8% of the outstanding shares. [A-1042-43]

Business Week on April 14, 1986 reported that Viacom's "defenses" had not "deterred some of the Street's most feared sharks, who are rumored to have taken large stakes in Viacom. Among them: Carl C. Icahn and Ivan F. Boesky." [A-1054].

Shortly before Viacom's annual shareholders meeting on May 1, 1986, Icahn telephoned Joseph R. Perella, at that time the co-head of the Investment Banking and Merger and Acquisitions Department of the First Boston Corporation, Viacom's investment banker. Icahn told Perella he owned just under 5% of Viacom's stock. Perella was familiar with Carl Icahn, his prior activities, and his "strategy" of accumulating stock, threatening the company with a take-over "thereby disrupting and

destabilizing the company," and then agreeing to sell his shares back to the company at a premium to market. Perella reported the call to management and went to meet with Icahn "to ascertain his intentions." Icahn gave Perella "the clear impression that he was interested in the Company repurchasing his shares at a premium." [A-1006-9].

Boesky also owned just under 5% of Viacom stock on May 1. There is evidence that Boesky and Icahn reached a secret agreement to share the profits from anticipated greenmail of Viacom; and on May 5 Boesky transferred 1,000,000 shares to Icahn for $63 per share pursuant to that agreement. [A-1415; A-389-433].[8] With the purported purchase of the Boesky holding, Icahn was over the 5% reporting requirement, and would have to publicly file the SEC required form 13D revealing his share ownership and supposed intentions by May 15th.

Icahn now turned his attention to JMB Realty, the Chicago company that controlled a large block of shares. In talking with JMB, Icahn did not discuss tendering for all the shares of Viacom. Instead, he warned them that if they did not sell their shares to him they "should be worried about the possibility of him selling [his] shares back to Viacom," because when that became public the share price would go down. On May 9, 1986 a JMB affiliate sold 1,500,000 shares to Icahn at $70 a share. [A-701-705; A-389-433]

On May 15th Icahn filed his form 13D. The form claimed that Icahn had told Viacom management "that [he] would be prepared to pay $75 per share" for all of Viacom's common stock, and that if agreement with Viacom management could not be reached, Icahn intended "to continue to explore the feasibility of, and strategies for, seeking control of [Viacom] and may determine to acquire additional shares of the Common Stock [of

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[8] In view of the unusual procedural history in this case reviewed in n.7, the premature grant of summary judgment, and Viacom's constitutional entitlement to due process and a civil jury trial, Viacom is entitled to numerous inferences for the purposes of this petition, including that Icahn and Boesky acted in concert and did not intend a takeover of Viacom, facts inferable from their conduct.

Viacom]." The form then stated that "no assurance can be given" that Icahn would not attempt to "dispose of shares of Common Stock . . . to [Viacom] for cash or otherwise." [A-389-433] Nowhere in the form did the name of Ivan Boesky appear, despite evidence that Icahn had an undisclosed agreement to act together with Boesky for purposes of acquiring, holding and disposing of the common stock of Viacom.

Icahn now frequently appeared in the media talking about his purchases of Viacom stock. He was quoted as announcing that "There are big buyers for pieces of the Company." [A-1007-8; A-820] Icahn began to go to the press, issue releases, seek publicity, a campaign described by Viacom director and former Chairman Ralph S. Baruch as "conducting a guerrilla warfare in the press." [A-695] Icahn was saying that if he were able to gain control of the Company he would break it up and dispose of its segments. [A-820]

The now highly public Icahn position in Viacom was perceived by the marketplace as a threat to the stability of the Company. [A-1008]. In particular, Icahn's public statements that "there are big buyers for pieces of the company" and that he would break-up the company had a very unsettling effect on the Company's operations. [A-842-46] In the entertainment business, creative people are highly sensitive to uncertainty. [A-821] Employees were highly concerned about their employment agreements; there were many inquiries about severance packages. [A-862-63] There was great turmoil among key employees, including threats to leave. [A-686][9]

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[9] Viacom's business negotiations began to be adversely affected. A long standing attempt to recruit a top executive for the entertainment group began to collapse as the potential recruit expressed his concern that Viacom "may not be around anymore." [A-849-78]. Viacom's partner in an important joint venture began calling repeatedly to say "they were very nervous about Mr. Icahn's involvement in the company." [A-849-78] Viacom was negotiating an acquisition with representatives of a major production company. After Icahn's public pressure began, Viacom was told that the production company was not interested as long as Icahn was present. [A-863] John White, a director of Viacom characterized the impression created by Icahn's press campaign as "that [Viacom] was going to hell in a hand basket." [A-686]

Perella continued to talk with Icahn through early May; on each occasion, Icahn would raise the possibility of the company purchasing his shares at a premium over the market price [A-1007-8]. On May 11, 1986 a special meeting of the Viacom Board of Directors was held. Perella reported his conversations with Icahn, and told the board that Icahn had no real intention of taking over and running the business of Viacom. [A-820] He advised the Board, based on his knowledge of Icahn's prior activities, that unless Viacom agreed to buy Icahn's shares, Icahn would continue to make public threats to bust up the company. [A-1008] If the Board did not buy off Icahn, he would continue with these destructive activities. [A-1008]

The Viacom Board of Directors was also supplied with a memorandum, prepared by the law firm of Skadden, Arps, Slate, Meagher & Flom, which reviewed Icahn's history and reputation. It quoted *The Wall Street Journal* of December 22, 1982 as characterizing Icahn's strategy as "doubly effective in relying not merely on greed but also on fear: fear of Mr. Icahn." The memorandum recounted a series of Icahn raids on public corporations. The raids were characterized by Icahn's acquiring shares (frequently just under the reporting minimum of 5%), threats to take actions that cause the disruption of the companies' business, and repurchase of Icahn's shares at a premium by the target. [A-944-946]

At first, the management and directors of Viacom were opposed to any purchase of Icahn's stock. [A-1009] But, as Icahn's activities continued, Viacom experienced increasing disruptions. [A-1009] CEO Elkes told the Board it was his belief that Icahn's presence and public statements would hurt the Company's ability to attract and keep creative talent.[A-821]

On May 15th Elkes reported to the Board on the 13D filed by Icahn. [A-822] Prior to the next meeting of the Board, copies of the 13D were distributed to the Board. [A-850] The Board met again on May 18th, to consider a proposal made to Elkes by Icahn to sell his shares to Viacom for a package consisting of cash ($62 per share, the then market price), warrants to purchase 2,500,000 shares of common stock, and $10,000,000 in

advertising time. In response to a director's questions, counsel informed the Board that the warrants would be subject to an Exchange Agreement which would prevent Mr. Icahn or any of his affiliates from again threatening the company for a lengthy period of time. [A-858-61]

The Board reconvened on May 19th. Outside director Conden inquired of the investment bankers as to Icahn's "plans for the warrants should the Company repurchase his shares." [A-870]

The independent directors thereupon met separately, and decided that it was in the best interests of the Company to buy Icahn's shares on th terms proposed. They concluded that the proposed purchase "while not an ideal solution to the threat to the company and its stockholders posed by the Icahn block, was the best solution under the circumstances." [A-873]

On May 21, 1986 Viacom purchased the Icahn (and Boesky) shares for a package of cash (equivalent to the then market price of $62 per share), warrants and air time for advertising, in total worth $79.50 per share. This represented a premium of more than $60,000,000 over the then market price of the securities. In an "Exchange Agreement," Icahn agreed not to purchase Viacom stock or otherwise seek to control Viacom for eleven years. [A-706-736]

Long-time Viacom Board Chairman [A-306] Baruch testified as to the motivation for the purchase of Icahn's shares at a premium. He explained that Icahn had bought shares, conducted guerrilla warfare in the press and had succeeded in creating chaos within the organization; that the Board knew that his reputation was to continue such activities until his stock was bought for more than its worth; and that the company was thus "blackmailed into paying greenmail." [A-689-90, 695-96] Outside director Leo Cherne testified that what Icahn had done was to create "an atmosphere of uncertainty and fear, because his object is not the acquisition of the company as was subsequently demonstrated. His object is sufficient uncertainty, fear, challenge, disruption to the company to make his greenmail purposes more obtainable." [A-700]

Subsequent to May 21, 1986 Viacom stock split two-for-one. On September 15, 1986, Icahn sent Viacom a letter putting it on notice that John Mulheren or an entity under Mulheren's control had offered to purchase Icahn's warrants with respect to 1,175,000 (587,500 pre-split) shares at a cash price of $12.50 ($25 per-split) per warrant. [A-794-5] Icahn also advised Viacom that Mulheren offered to purchase from Icahn a "stock appreciation right" in respect to 2,000,000 (1,000,000 pre-split) shares of Viacom stock. These 1,000,000 pre-split shares were the subject matter of the secret Boesky/Icahn agreement previously described. The Mulheren "offer" constituted the means by which the profits of the Viacom greenmail were to be divided between Boesky and Icahn.[10]

However, before this deal could be done, Boesky was apprehended and indicted for various crimes.[11] He later pled guilty to some of them and served a term of imprisonment.[12] On

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[10] See n. 8.

[11] See, generally, Stewart, *Den of Thieves*, *op cit.*

[12] Application to file footnote 12 under seal to be made.

June 14, 1989 Mulheren was indicted and later convicted for market manipulation and fraud in conspiring with Boesky and Icahn to carry out the substantially similar October 1985 greenmail of Gulf & Western, one of the RICO predicate acts alleged by Viacom. Mulheren's conviction was later reversed by the Second Circuit. *United States v. Mulheren*, 938 F.2d 364 (2d Cir. 1991).[13]

ARGUMENT

I

INTERPRETATION OF THE HOBBS ACT: RESPECTING THE CONGRESSIONAL TEXT, PROTECTING SECURITIES MARKETS, FORBIDDING WHITE COLLAR EXTORTION

This case brings the Court a record on which to resolve a series of difficult and vital questions about the applicability of the Hobbs Act, 18 U.S.C. §1951 to non-labor racketeering situations. In affirming the District Court, the Second Circuit in effect exempted all coercive transactions in securities from the Act's prohibitions, failing to heed the statute's plain language and this Court's teaching, at a time when sophisticated financial crimes have been on the increase.

Even though the District Court truncated the factual record, the discovered and admitted facts demonstrate that Carl Icahn obtained sixty million dollars from Viacom by starting to carry out a threat to disrupt Viacom's business. He had begun the complex and camouflaged process of splitting the proceeds of this

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[13] In an article in the March 11, 1991 issue of *The New Yorker* magazine: Bruck, "The World of Business: No One Like Me," *The New Yorker*, 40, 61-63 (March 11, 1991), author Connie Bruck describes the Boesky/Icahn/Mulheren involvement with Gulf & Western and Mulheren's trial and conviction for conspiracy and securities fraud [See A-765-90 and A-791-3]. Bruck says that she was able to sift through the notes of government attorneys' interviews with witnesses, including Boesky, which made plain, "how significant a focus of the investigation Icahn was compared with Mulheren." (p. 61), and how it was clear that Boesky and Icahn were "acting in concert." (pp. 62-63).

extortion with his confederate, Ivan Boesky, by the time Boesky's criminal conduct in other transactions was exposed and publicized.[14]

A. *Construction of the Hobbs Act*

The District Court, and Icahn's lawyers, focused attention on this Court's decision in *United States v. Enmons*, 410 U.S. 396 (1973), a 5 to 4 decision that exempted coercive conduct designed to achieve legitimate labor objectives from the Hobbs Act's reach. Chief Justice Burger, and Justices Douglas, Powell and (now Chief Justice) Rehnquist dissented. The problem with using *Enmons* in this way is not so much that it should be re-examined. Perhaps it should be, in a labor case.

Enmons is a controversial – some would say wrongly-decided – sharply limited decision that says what the Hobbs Act does *not* cover. Compare *United States v. Green*, 350 U.S. 415 (1956) (indictment of union leader and union to exact money for fictitious work states Hobbs Act offense).

The Second Circuit's use of *Enmons* as a basis for exempting from the Act a broad category of ordinary criminality affecting interstate commerce makes this case eminently worthy of certiorari. It is time to reaffirm what the Court has said before about how to read criminal statutes in general, and this statute in particular. In the years it has been on the books, the Hobbs Act has been an important weapon against violence and threats. Yet, this Court has not given the "wrongful use of fear" part of the Act plenary consideration. The lower courts may with some justification claim to be confused about the Act's proper reach.[15]

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[14] Icahn moved for a protective order to stay his deposition and other discovery until after the determination of his summary judgment motion. Viacom's responsive motion to compel Icahn's deposition was rejected. See n.7.

[15] We respectfully suggest that in a case of this kind, the Solicitor General should be asked to file a memorandum before the Court votes on certiorari. We have sent a courtesy copy of this petition to Solicitor General Starr.

By contrast, this Court has authoritatively construed the "color of official right" provisions of the Act, holding that a *quid pro quo* is necessary to conviction. *McCormick v. United States*, ____U.S.____, 111 S. Ct. 1807 (1991).

Let us begin the analysis by sweeping away some archaisms and impedimenta that have been loaded on this case. The Hobbs Act speaks of "extortion," a term broadly synonymous with "blackmail," although specifically directed by obtaining money or property rather than an intangible right. This much is clear from the discussion of similar language in the Travel Act. In *United States v. Nardello*, 393 U.S. 286 (1969), the Court regarded the Travel Act term "extortion" as equivalent to the Pennsylvania "blackmail" predicate. The Court noted the development of blackmail-type offenses to their present function as an offense against property. 393 U.S. at 289 and notes 3, 4 and 5.

In *United States v. Culbert*, 435 U.S. 371 (1978), the Court held that "racketeering" was not an essential element of a Hobbs Act offense. Congress, the Court said, intended to make criminal *all* conduct within the statute's reach. *Culbert* involved fear of physical violence. The promise of *Culbert* to victims of fear of economic loss has unfortunately been unredeemed in the Second Circuit. The First Circuit's reading of *Culbert* is, by contrast, consonant with the sweep of this Court's holding. *United States v. Sturm*, 870 F.2d 769 (1st Cir. 1989). In this case, this Court should – we suggest – return to the Hobbs Act's text and settle the issue.

B. *The Hobbs Act and Securities Transactions*

There are two significant aspects to the securities transaction issues in this case: the traditional understanding of blackmail, and the impact on markets of coercive behavior. The presence of these issues makes the case worthy of certiorari.

1. *Blackmail*

The District Court held that Viacom could not have been extorted because it had no pre-existing right to be free from disruption of its business. It acknowledged that fear of economic loss

can be "fear" within the meaning of the statute. As another judge had said earlier in the case, this view was plain wrong. "Blackmail is often a threat to do legal or permitted acts." [Appendix 37]

If I claim to know a damaging fact about a public figure, I have the right to tell that fact to the newspapers. I might be a defamer, but if my statements are true I have no liability of any kind, criminal or civil. But if I go to the public figure and ask for money in exchange for not going to the newspapers, I have committed extortion under the laws of almost every state, and if interstate commerce is affected I have violated the Hobbs Act.

That is the nature of blackmail/extortion. One might think that the statute's text was too clear to admit doubt. However, that is only another reason for granting the writ.

The court below also sidestepped the holdings of such cases as *United States v. Duhon*, 565 F.2d 345, 351 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978)("the defendant need not have originally caused the fear, nor need the cause of the fear itself be wrongful").

2. *Securities Transactions*

We have quoted above one reaction to the outbreak of greenmail. The entire purpose of establishing a national market for publicly-traded securities, and accompanying their registration, purchase and sale with so many protections, is to protect companies and the investing public. If a company is compelled to use its assets to fight off threats of disruption to its business, that is an affront to manifest Congressional policy and to the Hobbs Act's evident purpose of preventing interference with interstate commerce.

To be sure, in securities markets as in labor markets there are legitimate objectives that might be exempted form Hobbs Act scrutiny. Under this view, one would construe *Enmons* broadly and apply it to all business situations. *Enmons*, however, recognized that the classic example of nonlegitimate use of fear

was to pad a payroll with unwanted or fictitious services. In short, *Enmons* would criminalize a transaction in which the fear was used to get a benefit without a corresponding value in exchange.

Here, as we note below, the summary judgment posture of the case intersects with the significant legal issues. When Icahn got a premium over market price, was that a premium over the "value" of the stock? The district court held that Viacom got – for the extra money – a standstill covenant. Plaintiff's witnesses would have established that the market had efficiently valued Viacom's stock and that the premium was, therefore, extortionate. The court of appeals affirmance on this point is dealt with in Point II, below.

This grim and somewhat macabre calculus cannot be what the Hobbs Act is about, and is certainly foreign to the ordinary understanding of blackmail/extortion. Every extortion victim who pays off gets something of value in return, if the extorter delivers as promised. To introduce the concept of equivalency for what is extorted, as the court below did, is wrong.

Moreover, this error is in addition to the earlier one of holding that one cannot commit extortion by demanding money to refrain from doing something that one has a right to do.

In the securities markets, as in all markets, there is hard bargaining. *Enmons* deals, indeed, with bargaining that is particularly "hard." The Second Circuit seems to believe that greenmail should be given wholesale immunity from being treated as extortion. This view requires review here, because the task of statutory construction is to read what Congress has written and apply it uniformly. Second, the decision on which "putting in fear" is actionable and which is not is for triers of fact, not for resolution by invocation of legal apriorities.

II

INTERPRETATION OF INJURY TO BUSINESS OR PROPERTY: PROTECTING THE VICTIMS OF WHITE COLLAR EXTORTION

This case also brings the Court a record on which to resolve a vital issue under the civil liability provisions of RICO, 18 U.S.C. §1964(c). The court below in effect held that a victim of white collar extortion – greenmail – does not suffer injury to its business or property because "the intensity of the purchaser's desire to acquire" the greenmailer's stock position may be such as to deem the price paid as "fair," regardless of the relation between price paid and the market price of the stock. Slip op. at 44-45.

In so holding, the court below failed to apply properly or, for that matter, even consider, the appropriate measure of injury set forth in §1964(c), as interpreted by this Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

As discussed below, Viacom was injured in its business or property because it was extorted to pay Icahn more than he was entitled to receive for his shares absent his disruptive and wrongful conduct. Stated differently, Viacom was injured in its business and property by reason of Icahn's pattern of racketeering activity – the systematic pattern of utilizing Hobbs Act extortion (*i.e.* fear of economic loss) to obtain greenmail – which enabled Icahn to obtain property of Viacom to which he was not entitled, *viz.* a premium over the market value of his shares on May 22, 1986.

A. *Injury Under RICO and the Hobbs Act*

Section 1964(c) of the RICO statute, 18 U.S.C. §1964(c), provides a civil remedy to "any person injured in his business or property by reason of a violation of section 1962 of this chapter. . . ." In *Sedima, supra*, this Court construed this language broadly, after giving due consideration to the Congressional language and intent:

> "[T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in §1962(c), 'an activity which RICO was designed to deter.' Any recoverable damages occurring by reason of a violation of §1962(c) will flow from the commission of the predicate acts."

Id. 473 U.S. at 497.

This Court went on to note that "such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery." *Id.* at n. 15. Among the examples of "competitive injury" posited by the dissent was the following:

> "If a 'racketeer' uses . . . threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers, the targeted businessmen could sue to recover for injury to their business and property resulting from the added costs. This would be so if they were the direct victims of the predicate acts or if they had reacted to offenses committed against other businessmen. In each case, the predicate acts were committed in order to accomplish a certain end – *e.g.*, to induce the prospective plaintiffs to take action to the economic benefit of the racketeer; in each case the result would have taken a toll on the competitive position of the prospective plaintiff by increasing his costs of doing business."

Id. at 521.[16]

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[16] This, we contend, is precisely what happened to Viacom here. See discussion at Point II(B), *infra*.

The use of the term "property" within the statutory language of Section 1964(c) is consistent with the definition of extortion under the Hobbs Act – "the obtaining of *property* from another. . . ." 18 U.S.C. §1951(b)(2). As with the damage provisions of RICO, the courts have broadly interpreted the meaning of property under the Hobbs Act to include intangible as well as tangible property, including the right "to make a business decision free from outside pressure wrongfully imposed." *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979). *See also United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

Following this Court's ruling in *Sedima*, the circuit courts of appeals have applied various damage formulations to Section 1964(c) claims. *See, e.g., Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1309-10 (7th Cir. 1987) ("The measure of damages under civil RICO is the harm occasioned as a result of the predicate acts . . . A plaintiff injured by civil RICO violations deserves a 'complete recovery.'"); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985) ("Business interruptions" resulting from scheme to defraud fall within scope of "[a]ny injury to business or property caused by a violation of 18 U.S.C. §1962(c)"); *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1301 (6th Cir. 1989)[17]

B. *Viacom Has Been Injured in Its Business or Property*

This case requires the application of traditional principles of extortion and blackmail (as codified in the Hobbs Act and made

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[17] One commentator has recently stated that "the lower federal courts have differed as to the type of causal nexus between a plaintiff's injury and a defendant's racketeering activities which is required. . . ." Ginger, *Causation and Civil RICO Standing: When Is a Plaintiff Injured "By Reason Of" A RICO Violation?*, 64 St. John's L. Rev. 849, 850 (1990). The author calls for additional clarification on these issues from this Court.

actionable under RICO) to the modern-day economic realities of the capital market system. The presence of these issues also makes the case worthy of certiorari.

It cannot be disputed that if Icahn had attempted to sell his Viacom shares in the open securities markets on May 22, 1986 he could have received only that which was available to every other Viacom shareholder: the market price. Yet, Icahn's extortionate behavior enabled him to extract something more from his victim, a substantial premium — tens of millions of dollars — over the market price. Thus, Icahn's conduct successfully induced Viacom to take action to his economic benefit while at the same time increasing Viacom's costs of doing business.[18] This is precisely the type of "competitive injury" described by this Court in *Sedima*, *supra*, 473 U.S. at 521.

The court below ignored this fundamental element of blackmail — the ability of the extortionist to compel his victim to part with property which it otherwise could have kept (here, a premium over market price). The Circuit Court's conclusion, reached in the face of disputed evidence in the record,[19] was grounded instead on the premise that Viacom got a bargain because its shares were actually worth more than what Icahn received. Yet, this rationale is fundamentally flawed.

The evidence submitted to the court below was unequivocal and uncontradicted that the Viacom Board had no intention

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[18] If Viacom had merely desired to purchase back and retain some of its shares in May, 1986, it could have gone into the capital markets and done so at the prevailing price. It was Icahn's Hobbs Act/extortionate behavior which resulted in Viacom paying more for its shares than it might have otherwise. Similarly, Icahn extorted from Viacom its right to make a business decision regarding his overtures free from "outside pressure wrongfully imposed." *United States v. Santoni*, *supra*, 585 F.2d at 673.

[19] Viacom submitted evidence, in the form of expert testimony and supporting factual matter, that the most accurate gauge of the value of Viacom shares on May 22, 1986 was the market price on the New York Stock Exchange. The concurring opinion below recognized that the issue of " 'fairness of consideration is generally a question of fact' ", Slip at 47, quoting *Klein v. Tabatchnick*, 610 F.2d 1043, 1047 (2d Cir. 1979).

of selling Viacom in May of 1986 and that its policies and plans were all adopted with a view to maximizing long-term shareholder value, with Viacom remaining independent. The court below confused the fundamental distinction between the value of shares trading in the marketplace and the value of an entire company when purchased at a premium in a corporate control transaction at a later time.

As Icahn's own expert in the proceedings below, Professor Jarrell, has documented, acquiring firms routinely pay sizeable premiums over prevailing market prices to obtain control of target firms. *See* Jarrell, Brickley & Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. Econ. Perspec. 49 (1988). For the time period at issue in this case, the typical premium was over 30 percent. *Id.* at 52. Comparable premiums are also routinely paid in management-led going-private transactions. *Id.* at 51-52. When National Amusements agreed to pay approximately $111 per share (pre-split) in March 1987 for the shares of Viacom stock that it did not already own, it was buying control of the company. Similarly, when Viacom's management proposed a going-private transaction at $81 per share in September 1986, it was proposing to acquire control of the entire company.

The best estimate of the value of individual non-control shares of Viacom stock in May 1986, however, is the price that was established in active trading on the New York Stock Exchange. The price paid by National Amusements in corporate control transaction nine months later or the price offered by management in a proposed corporate control transaction four months later is simply irrelevant for determining the value of shares in May 1986.[20]

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[20] As one court that relied on market value noted:

> In most cases liquidation value of assets is not an appropriate consideration, since "liquidation" comprehends the termination of the business and disposal of the assets. *Valuation on such a basis would be unrealistic* except possibly when the firm is insolvent or when certain assets are idle and of no further use to the company. Most courts generally prefer to look to the "going concern" value.

Seaboard World Airlines, Inc. v. Tiger Intern. Inc., 600 F.2d 355, 362 (2d Cir. 1979) (citation omitted; emphasis in original)

This is consonant with this Court's holding in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), where the Court specifically endorsed the efficient capital market theory, citing the studies of plaintiff's expert, Daniel R. Fischel, among others:

> "Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information. . . ."

Id. at 246.

In reaching this conclusion in *Basic*, the Supreme Court cited legislative history of the Securities Exchange Act of 1934:

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just price. . . ." H.R.Rep. No. 1383.

Id.

The methodologies for determining the fair value of shares in an appraisal proceeding do not apply here. Nonetheless, it is noteworthy that even in appraisal proceedings market value may be conclusive. This was the holding in *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977), where the Seventh Circuit succinctly stated that:

> We hold that when market value is available and reliable, other factors should not be utilized in determining whether the terms of a merger were fair. Although criteria such as earnings and book value are an indication of actual worth, they are only secondary indicia. In a market economy, market value will

> always be the primary gauge of an enterprise's worth. In this case thousands of shares. . . were traded on the New York Stock Exchange. . . by outside investors who had access to the full gamut of financial information . . . including earnings and book value. If we were to independently assess criteria other than market value . . . we would be substituting our abstract judgment for that of the market. Aside from the problems that would arise in deciding how much weight to give each criterion, such a method would be economically unsound.

Id. at 1247-48.

In declining to utilize the efficient capital market theory, the court below found that numerous courts have rejected the theory and, instead, have applied alternative theories of valuation. Yet, each of those cases dealt with situations calling for evaluation of shares in the context of the sale of a public company *as a whole*. At the time of Viacom's repurchase of Icahn's shares, *Viacom was not for sale*. Accordingly, Icahn was not entitled to an appraisal of his shares.

In *Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb, Inc.*, 709 F. Supp. 438 (S.D.N.Y. 1989), the court recognized that "inherent value" is a value ascribed where an enterprise is being bought "as a whole". *Id.* at 446. In *Litton*, the court was not evaluating the issue of damages, but was instead assessing the lack of causation between defendants' alleged insider trading and plaintiffs' claim that but for the trading, it would have paid less for an acquisition of a company called Itek. Unlike this action, *Litton* involved the negotiation of a friendly merger transaction. The court determined that "inherent value" was a relevant factor because the directors of Itek considered such inherent values, as they were duty bound to do, in evaluating and negotiating a proposal to acquire the company as a whole. *Id.* at 446-47. The decision is silent as to the issue here — whether Viacom was injured in its business or property when it paid Icahn a greenmail premium to which he was not entitled, and which he would have been unable to obtain had he sold his shares in the market.

Similarly, *Paramount Communications Inc. v. Time Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514 (Del. Ch.), *aff'd* 571 A.2d 1140, (Del. Supr. 1989), also relied upon by the court below, involved the exercise of business judgment by the board of directors of Time Inc. The board rejected a tender offer by Paramount to acquire the company *as a whole* and, instead, agreed to a business combination with Warner Communications, Inc. The Time board determined that the combination with Warner was in the long-term best interests of Time shareholders.[21]

In *Sedima*, this Court framed a broad definition of RICO injury consistent with the express Congressional intent regarding the remedial nature of the statutory provisions, and equally consistent with the definition of "property" as used with respect to Hobbs Act extortion. The court below seems to believe (albeit inconsistently with this Court's ruling in *Sedima*) that the victim of greenmail suffers no RICO injury as long as it gets the relief for which it bargained. This view requires review here because if RICO is to be fairly applied, it must be interpreted consistently.

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[21] The court below quoted the court in *Paramount* as stating that the theory of a single, efficient capital market has not been given "the dignity of a sacred text." In fact, what the *Paramount* court stated was:

> "neither does the *common law of directors' duties* elevate the theory of a single, efficient capital market to the dignity of a sacred text." *Id.* at 93,277.

In fact, the *Paramount* court did *not* reject the efficient market theory as a guide for a jury determining damages.

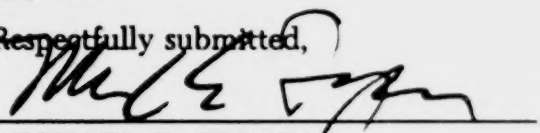
CONCLUSION

In this case, $60 million was taken by Icahn from Viacom in open light of day, in exchange for cessation of acknowledged and effective threats of business disruption. The record provides a basis for resolution of significant issues of federal criminal law, civil RICO standing, and the right to a trial on disputed evidence of damages.

We respectfully submit that review of this case will permit the Court to clarify the reach of a criminal statute vital to protection of interstate commerce from unlawful threats, a statute which has been narrowly interpreted and applied by the Second Circuit in a manner at odds with the First Circuit. It will also permit reasoned evaluation of the theories erected by Icahn to prevent his own deposition and a trial to determine whether his conduct was "wrongful" and the nature and extent of the harm done to Viacom by the greenmail payments.

Dated: December 23, 1991

Respectfully submitted,



MICHAEL E. TIGAR*
727 East 26th Street
Austin, TX 78705
(512) 471-6319

STEPHEN LOWEY
NEIL L. SELINGER
LOWEY DANNENBERG BEMPORAD
& SELINGER, P.C.
747 Third Avenue
New York, NY 10017
(212) 759-1504

EDWARD LABATON
New York, NY

JOHN MAGE
New York, NY

**Counsel of Record*